IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER DEFEO	:	**CIVIL ACTION**
	:	
v.	:	
	:	
ALLSTATE INS. CO.	:	**NO. 95-244**

M E M O R A N D U M

WALDMAN, J. **June 19, 1998**

Plaintiff initiated this breach of insurance contract and 42 Pa. C.S.A. § 8371 bad faith claim against the defendant in January 1995. Plaintiff alleged that defendant breached its policy obligations and acted in bad faith when in November 1994 it denied his theft claim for $253,000 worth of antiques, jewelry, guns, gold and cash.[1]

Defendant did not deny that a former employee of plaintiff had stolen some property he had been assigned to transport. Defendant, however, asserted that it properly denied the claim when plaintiff failed to cooperate in the ensuing investigation by not supplying certain requested documents and not completing an examination under oath. Defendant asserted that it had a good faith basis to suspect that not all of the items listed by plaintiff had been stolen and that his claim included stolen items which had been recovered by the

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[1] Plaintiff initially filed a claim of loss with defendant on October 7, 1993 for $199,460.

Pennsylvania State Police when they apprehended the thief. In his confession the thief denied stealing some items claimed by plaintiff. Some items which were stolen but recovered and returned to plaintiff were sent by him for sale to an auction house under a fictitious name. Defendant asserted that its decision to pursue a thorough investigation was thus reasonable and proper.

On July 11, 1996, defendant moved to dismiss this action consistent with Fed. R. Civ. P. 37(b)(2), 37(c)(1) and 41(b) when plaintiff had failed for almost 16 months to provide self-executing discovery or to respond to defendant's interrogatories. The court denied that motion without prejudice to renew if plaintiff did not promptly provide all outstanding discovery. By order of September 3, 1996, plaintiff was given a further 20 days to comply with his discovery obligations. Plaintiff did not comply and defendant renewed its dismissal motion which was granted on December 5, 1996, subject to a final opportunity forthwith to comply. An order of dismissal was executed on December 27, 1996 and docketed by the clerk on December 30, 1996. Precisely one year later, plaintiff filed a "Rule 60 Motion" in which he seeks to vacate the order of dismissal and to reinstate this action "under Fed. R. Civ. P. 60(b)(1) and/or 60(b)(6)."

With his motion, plaintiff submitted a sworn affidavit

in which he essentially blames his attorney of record in this action for the failure for 21 months to provide the required discovery. The attorney, John Siegle, died a year before the execution of the affidavit.

Plaintiff avers in the affidavit that he "met with Siegle approximately every month between January 1995 and the Fall of 1996 to discuss matters in connection with my lawsuit with Allstate" and other legal matters in which Mr. Siegle was also representing plaintiff.

Plaintiff avers that he provided Mr. Siegle "all information requested" in connection with this action and believed he was in compliance with his discovery obligations. Plaintiff avers that Mr. Siegle, who suffered from emphysema, sometime in the Fall of 1996 became seriously ill and entered a hospital where he died the following December 29th. Plaintiff avers that Mr. Siegle had not told him about any dismissal motion or order, and that he first learned about the dismissal on January 7, 1997 from Donald Lehrkinder, Jr., Esq., the executor of Mr. Siegle’s estate.

The court held a hearing on the motion which was concluded on June 9, 1998. Plaintiff’s testimony at that hearing cannot easily be reconciled with his affidavit or with other evidence which was presented.

Plaintiff testified that he is a commercial builder and business entrepreneur and has been a party in many lawsuits.[2] He testified that he is "very assertive" and "keeps on attorneys to get a job done." He testified that contrary to the suggestion in his affidavit, he did not discuss this case each month with Mr. Siegle but did do so periodically and as late as November or December of 1996. He testified that Mr. Siegle was "very responsible," had neither withheld any information nor been derelict in any other matter in which he also represented plaintiff and "was successfully handling other cases" including one six months before his death.

Plaintiff testified that the reason he did not pursue this action was because he "thought nothing could happen in the case because of [his] bankruptcy." He acknowledged he now understands that claims by a bankrupt are not stayed and he was free to pursue this action as a debtor in possession under Chapter 11 through September 4, 1996 when his case was converted to a Chapter 7 one. In fact, plaintiff engaged counsel and initiated this action while a debtor in possession under Chapter 11.[3]

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[2] At the time he filed a Chapter 11 petition in July 1994, Mr. DeFeo was a party defendant in 42 cases and a party plaintiff in four.

[3] Plaintiff filed a Chapter 11 petition and required schedules on July 11, 1994.

Plaintiff acknowledged that he asked neither Mr. Siegle nor James Matour, plaintiff's bankruptcy counsel with whom he spoke "daily," whether the pendency of bankruptcy proceedings precluded prosecution of this action, and that no attorney ever told him such proceedings were preclusive or excused his compliance with discovery obligations in a case in which he was the plaintiff.[4] The court credits the testimony of Mr. Matour that plaintiff knew he could pursue this case under Chapter 11 and indeed had asked Mr. Matour in the Summer of 1996 to assume representation, which he declined to do.[5]

Mr. Matour testified that the Allstate claim was disclosed to the bankruptcy court and Chapter 7 trustee who never pursued it. This is true to a point. Plaintiff first listed this claim on an amended schedule which was filed on November 21, 1996, two years after it had in fact accrued.

Plaintiff testified he was "not sure" if he had received defendant's interrogatories. Plaintiff's case file, however, contained a letter of March 16, 1995 from Mr. Siegle to

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[4] The court was never apprised at any time during the pendency of this action that plaintiff was involved in bankruptcy proceedings of any kind.

[5] Mr. Siegle advised plaintiff that his health was deteriorating and he wished to obtain substitute counsel for this action. At plaintiff's behest, there was an understanding that Mr. Siegle would remain the "responsible attorney" for the case until satisfactory substitute counsel might be obtained and, as noted, he continued to discuss the case with plaintiff through November or December of 1996.

plaintiff expressly noting the enclosure of defendant's interrogatories.

Defendant's attorney, John Brinkmann, notified an associate of Mr. Matour by correspondence of June 4, 1996 that defendant would be seeking dismissal of this action. The court credits Mr. Matour's testimony that he would have passed such a letter on to plaintiff.

The court credits Mr. Brinkmann's testimony that he received a telephone call on July 16, 1995 from Mr. Siegle advising him that he had received defendant's motion to dismiss for failure to comply with discovery obligations and was sending a copy to plaintiff. The court credits Mr. Brinkmann's testimony that he asked Mr. Siegle on September 24, 1996 if plaintiff would finally provide discovery and comply with the court order of September 3, 1996 giving him a further 20 days to do so, and that Mr. Siegle responded plaintiff "had decided not to do anything."[6]

The court credits the testimony given by Mr. Lehrkinder. He was a mutual friend of plaintiff and Mr. Siegle

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[6] As noted, plaintiff testified that it was expressly understood Mr. Siegle was authorized to represent plaintiff's interests in this case at the time the statement was made and the statement clearly concerned a matter within the scope of that engagement. Mr. Siegle's statement is thus admissible under Fed. R. Evid. 801(d)(2)(D). See, e.g., United States v. Gregory, 871 F.2d 1239, 1243 (4th Cir. 1989), cert. denied, 493 U.S. 1020 (1990); United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984); United Stated v. Vito, 1988 WL 78031, *1-2 (E.D. Pa. July 22, 1988).

and had represented plaintiff on a number of legal matters over a period of years. Mr. Lehrkinder personally and in writing on January 7, 1997 apprised plaintiff that he found among Mr. Siegle's papers the order of dismissal and advised plaintiff to "contact an attorney at once" if he wished to reinstate or pursue this case. Plaintiff was not surprised or upset to learn of the dismissal. Plaintiff made no complaint regarding Mr. Siegle. To the best of his recollection, plaintiff stated to Mr. Lehrkinder that "he was not going to do anything" about the case.[7]

Plaintiff submitted a copy of a letter to the court dated January 21, 1997 setting forth a "request to reactivate [this] case for a ninety day period" so he could "hire replacement counsel" for Mr. Siegle who had recently "passed away." There is no record in the court file of the original of this letter being docketed or received. Defense counsel was not copied. The letter shows copies ("cc") to Mr. Matour and Mr. Lehrkinder. Neither gentleman has a record of receiving such a copy and none was found in their respective files. However skeptical one may be as a result about whether such a letter was contemporaneously mailed, it nevertheless is a statement by a party presented to the court in connection with the pending motion.

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[7] Because the capacity and context in which Mr. Siegle spoke were not sufficiently clear to satisfy Rule 801(d)(2)(D), the court has not relied on Mr. Lehrkinder's testimony that Mr. Siegle also stated to him in the Summer of 1996 that plaintiff had decided not to pursue this action.

The letter contains no suggestion that Mr. Siegle had been professionally deficient in any way. To the contrary, it states that "[i]t would be appreciated if Mr. Siegle's work on this case could have its day in court." There is no suggestion that plaintiff had been unaware of the status of the litigation. To the contrary, the order of dismissal is characterized as "rightfully filed."[8]

In his motion and brief plaintiff does not specify which predicate in Rule 60(b)(1) he relies upon, and appears to conflate the bases for relief under Rule 60(b)(1) and Rule 60 (b)(6).

Rule 60(b)(1) and Rule 60(b)(6) are mutually exclusive as relief under Rule 60(b)(6) is unavailable for any reason encompassed by subsections (1)-(5). See Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863 & n.11 (1988); United States v. Real Property & Residence, 920 F.2d 788, 791 (11th Cir. 1991); Endicott Johnson Corp. v. Liberty Mut. Ins. Co., 986 F. supp. 120, 122 (N.D.N.Y. 1997); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2864, at 362. Relief under Rule 60(b)(6) is extraordinary and is available only in exceptional circumstances. Nelson v. City Colleges of Chicago, 962 F.2d 754, 755 (7th Cir. 1992); Boughner v. Secretary of Health, Ed. & Welf., 572 F.2d 976, 978 (3d Cir. 1978). A party

[8] When Mr. Lehrkinder gave plaintiff the order of dismissal and supporting memorandum there was still time to file a motion for reconsideration or an appeal. Neither was ever filed.

seeking such relief must show that an "extreme" and "unexpected" hardship will result without it. Id.

From his reliance on Boughner, it appears that plaintiff's Rule 60(b)(6) argument is premised on gross neglect by Mr. Siegle. As explained at oral argument, plaintiff's Rule 60(b)(1) contention is that he should be "excused" for Mr. Siegle's "neglect."

Carelessness of a litigant or his attorney is not a ground for relief under Rule 60(b)(1). Mayfield v. Vanguard Savings & Loan Ass'n., 1989 WL 106986, *3 (E.D. Pa. Sept. 8, 1989) (citing cases); Andrews v. Time, Inc., 690 F. Supp. 362, 364 (E.D. Pa. 1988). Insofar as plaintiff is suggesting that his failure to provide discovery for almost two years is due to excusable neglect, his or his attorney's, the credible evidence of record and the reasonable inferences amply supported thereby show otherwise.

Mr. Siegle forwarded to plaintiff the defendant's interrogatories and motion to dismiss for failure to provide discovery, and the order of September 3, 1996 denying the motion "without prejudice" if plaintiff did not promptly cure his delinquency. This does not evince neglect, let alone gross neglect. Assuming that Mr. Siegle did not forward to plaintiff the order of December 5, 1996 giving him a final warning, such failure may be excusable given Mr. Siegle's illness. It would

not, however, warrant the relief sought by plaintiff.

An indulgent court may choose to provide repeated warnings, but a delinquent party is not entitled to them. A case may be dismissed under Rule 41(b) for failure of the party "to comply with [the federal] Rules or any order of court" and, in this circuit, where the weight of the Poulis factors warrants it.[9]

More importantly, in response to the September 3rd order, plaintiff advised Mr. Siegle he had decided not to do anything. Plaintiff's continuing failure thereafter to provide discovery cannot fairly be attributed to any deterioration of Mr. Siegle's health. Plaintiff's alternative explanation that he thought he was excused from attending to the case while bankruptcy proceedings were pending is not credible and is belied by the evidence.

Plaintiff engaged counsel and initiated suit after filing for bankruptcy. He consulted periodically about the case with Mr. Siegle during the pendency of bankruptcy proceedings and

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[9] Much of plaintiff's brief is dedicated to reanalyzing the Poulis factors on the assumption that his recent averments change the equation by showing the dereliction and violations in question were attributable to his attorney. A Rule 60(b) motion is not a substitute for a timely motion to reconsider. In any event, based on the testimony and other evidence presented in connection with this motion, the court would conclude even more confidently that plaintiff is directly responsible for failing to provide discovery for almost two years and for ignoring at least two court orders directing him to do so.

at one point asked Mr. Matour to assume representation in the case. Plaintiff was never advised by Mr. Matour or any other attorney that the bankruptcy proceedings excused his compliance with discovery obligations in this civil suit. Plaintiff never even listed the claim filed with Allstate or the subsequent lawsuit on his bankruptcy schedules until November 21, 1996, after he twice failed to comply with court orders compelling discovery and alerting him to the prospect of dismissal.[10]

Plaintiff's continuing failure to provide discovery clearly is not attributable to any excusable neglect on his part.

Gross neglect by counsel amounting to abandonment may justify relief under Rule 60(b)(6). See Boughner, 572 F.2d at 978.[11] The Court in Boughner noted "the absence of neglect" by plaintiffs who were disability benefits claimants and the "extreme and unexpected hardship" which would result in the absence of relief. Id. at 979.

That a party claims to have been uninformed about the status of proceedings in a pending case does not equate with

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[10] There is no suggestion that the trustee was actually prejudiced as he later determined and certified to the bankruptcy court that the claim against Allstate was "of no value."

[11] This view is not uniform. See Nelson, 962 F.2d at 756 ("we continue to cast serious doubt on the theory that an attorney's gross negligence warrants relief under Rule 60(b)). The court in Nelson noted the perverse incentives and consequences of denying relief for inexcusable neglect but permitting it for "gross neglect."

gross neglect of counsel or denote an absence of fault by the party. See Nelson, 962 F.2d at 756 (client has duty diligently to monitor developments in litigation); Mayfield, 1989 WL 106986 at *4 (that party was personally uninformed of state of matters before court will not justify Rule 60(b)(6) relief). Moreover, plaintiff was informed and Mr. Siegle was not grossly negligent. Plaintiff spoke periodically about the case with Mr. Siegle until the month of his death. Mr. Siegle sent plaintiff the interrogatories, the motion to dismiss and two court orders compelling discovery. Mr. Siegle was simultaneously representing plaintiff to his satisfaction in other matters. Plaintiff admits that he was aggressive in pursuing his attorneys for a result.

Plaintiff is not a faultless victim and any hardship he faces cannot fairly be characterized as "unexpected." He was given the outstanding interrogatories, the motion to dismiss for failure to provide discovery and court orders directing him to do so. Plaintiff was a sophisticated businessman and no stranger to the conduct of litigation. He had ignored his discovery obligations for 20 months before Mr. Siegle was hospitalized. Plaintiff was well aware throughout the pendency of the case that Mr. Siegle had a condition which could affect his health. Moreover, plaintiff made and communicated to Mr. Siegle a decision to do nothing in response to court orders compelling discovery. Rule 60(b)(6) is not intended to relieve a party from

the consequences of his deliberate choices. Mayfield, 1989 WL 106986 at *3; Chang v. Smith, 103 F.R.D. 401, 405 (D.P.R. 1984)(citing cases).

Rule 60(b)(6) is essentially an equitable provision designed to prevent an injustice. To now grant the relief sought by plaintiff would effectively permit him to receive the benefit and escape the consequences of his own dereliction.

In view of the foregoing, the court need not resolve defendant's claim that plaintiff also failed to file his Rule 60(b) motion "within a reasonable time." The court notes, however, that a Rule 60(b) movant as a threshold matter must provide "a good reason for any delay in filing." Harduvel v. General Dynamics Corp., 801 F. Supp. 597, 603 (M.D. Fla. 1992). The only reason testified to by plaintiff is that he "was told by someone at the court that he had a year to file." No specific person associated with the court was identified. The court does not believe that any court official or employee would provide ex parte legal advice to a litigant, particularly such incorrect advice.

"A [Rule 60(b)] motion is not timely merely because it has been filed within one year of the judgment." White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990). The one year period, applicable to subsections (1)-(3), is an outer limit and any Rule 60(b) motion is subject to denial if it

is not also made within a reasonable time after the basis for relief is known. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th cir. 1986); 12 James Wm. Moore et al., Moore's Federal Practice § 60.65[1] (3d ed. 1998).

Consistent with the foregoing discussion, plaintiff's motion will be denied. An appropriate order will be entered.

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O R D E R

AND NOW, this day of June, 1998, upon consideration of plaintiff's Rule 60 Motion and defendant's response thereto, after an opportunity for a hearing and argument thereon, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.